(3)

No. 90-1020

In The

Supreme Court of the United States

October Term, 1990

COUNTY OF WAYNE, MICHIGAN,
Petitioner,

v

LINDA HARTLEY RUSHING,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

BRIEF FOR THE MICHIGAN MUNICIPAL LEAGUE AS *AMICUS CURIÆ* IN SUPPORT OF PETITIONER WAYNE COUNTY

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QUESTION PRESENTED

WHETHER WAYNE COUNTY CAN BE LIABLE UNDER 42 U.S.C. § 1983 FOR FAILURE TO TRAIN ITS EMPLOYEES, WHERE RESPONDENT, A SUICIDAL PRETRIAL DETAINEE, HAD BEEN PARTIALLY STRIPPED OF HER CLOTHING PURSUANT TO COURT ORDER AND WAS ALLEGEDLY VIEWED BY MALES, WHERE EXTANT POLICY PROHIBITED SUCH EXPOSURE, AND WHERE THE PRIVACY RIGHT ASSERTED HAS NEVER BEEN CLEARLY ESTABLISHED?

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This submission is made with the consent of both parties pursuant to Supreme Court Rule 37. Letters expressing their consent are on file with the Clerk of the Court.

The Michigan Municipal League, a non-profit Michigan corporation, is comprised of 501 Michigan cities and villages, including 188 cities and villages comprising the Michigan Municipal League Defense Fund. The filing of this Brief *Amicus Curiæ* has been authorized by the Board of Directors of the League's Legal Defense Fund, in light of the Michigan Supreme Court's misinterpretation of *City of Canton* v. *Harris*, 489 U.S. 378 (1989), which erroneously allows imposition of respondeat superior liability on the petitioner. The Michigan Supreme Court's opinion has significant consequences to governments caught in the "Catch 22"

of accommodating the privacy rights of pretrial detainees against the rights of male and female employees to full and equal employment opportunities.[1] The opinion further creates conflicts about the appropriate federal standards governing failure to train cases among Michigan's highest court, the Sixth Circuit, and this Court.[2]

STATEMENT

1. Respondent Linda Hartley Rushing was arrested on a charge of obstruction of justice and housed as a pretrial detainee in the female ward of the Wayne County Jail from June 8 through 12, 1976 when she was released on bond. (Pet. p 4, n. 1).

2. On June 9, 1976, respondent's sister telephoned Wayne County Jail investigator John Nicoll, informing him that respondent had threatened suicide. Pursuing his duty to protect a potentially-suicidal inmate, the jail investigator immediately notified the personnel on respondent's ward, the jail doctor, psychologist and psychiatrist of that threat. (*Rushing* v. *Wayne County*, 138 Mich. App. 121, 358 N.W. 2d 904 (1984)).

Consistent with a three-month-old Circuit Court Order (Pet. App. A-116), jail psychologist You Kim, whose principal assignment was the diagnostic evaluation of mentally ill and suicidal individuals, immediately ordered respondent to be stripped of all of her

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[1] See, e.g., *Griffin* v. *Michigan Department of Corrections*, 654 F. Supp. 690 (E.D. Mich. 1982).

[2] See, e.g., *Rushing* v. *Wayne County*, 436 Mich. 247, 462 N.W. 2d 23 (1990); cf. *Danese* v. *Asman*, 875 F.2d 1239, 1245 n. 4 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1473 (1990); *Beddingfield* v. *City of Pulaski*, 861 F.2d 968 (6th Cir. 1988), *cert. denied*, 110 S. Ct. 1473 (1990); *Roberts* v. *City of Troy*, 773 F.2d 720 (6th Cir. 1985).

clothing except her underpants. The jail psychologist then interviewed the respondent. He determined that she was not psychotic but suicidal-acute, the most serious classification of suicidal inmates. During this interview, respondent told the psychologist she was epileptic and needed Dilantin. The psychologist conveyed this information to the jail physician. Neither the jail psychiatrist nor psychologist saw respondent during the remainder of her detention.[3]

3. For safety reasons, including the protection of her own right to life, the respondent remained partially unclothed during the remainder of her confinement.

4. Under prevailing Michigan Department of Corrections general policy, and the controlling court order, a suicidal inmate was required to be kept under continuous observation.

5. Further, pursuant to policies promulgated by Wayne County jail administrator Frank Wilkerson, male personnel were not generally assigned to female wards. While male custodial personnel could be assigned, they were only permitted on the female ward if directly supervised by female officers. Male deputies could enter the female ward in case of emergency or problems with inmates.

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[3] The Michigan Court of Appeals' opinion observed that respondent received epileptic medication for two of the four days of respondent's confinement. For some unknown reason, she was not supplied with medication for the remaining two days. An inadvertent or negligent failure to provide medical care does not state a constitutional violation. *Estelle* v. *Gamble*, 429 U.S. 97 (1976); *Davidson* v. *Cannon*, 474 U.S. 344 (1986) (negligence action for medical malpractice not within due process protection).

Michigan Supreme Court Justice Boyle's concurring opinion would remand only on the question of the County's deliberate indifference to respondent's medical needs. The Michigan Supreme Court majority did not reverse on this issue. Instead, it interpreted 42 U.S.C. § 1983 municipal liability policy cases adverse to Wayne County on the privacy question.

6. The respondent's original complaint and amended complaint, filed in 1977 and 1981, respectively, alleged that the jail psychologist and jail psychiatrist violated 42 U.S.C. § 1983 [4] by allowing respondent to remain unclothed except for her underpants in view of other women and male jail employees.[5] She specifically alleged that petitioner permitted a male janitor as well as a group of male visitors to view her in an unclothed state, despite her requests for clothing and shielding from the view of others. Respondent asserted that Wayne County and the individual defendants deliberately ignored her requests and behaved with conscious indifference and malice, an apparent respondeat superior claim. Further, respondent's complaint gener-

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[4] 42 U.S.C. § 1983 (1976), states in pertinent part:

> [E]very person who, under color of any statute, ordinance, regulation, custom, or usage of any state or territory or the District of Columbia, subjects, or causes to be subjected, any Citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[5] Respondent's 1981 amended complaint alleged that the jail psychologist and psychiatrist caused her:

> [t]o be needlessly disrobed and to remain disrobed in a prison cell for several days, except for some small panties. That during this time the Defendants intentionally compelled the Plaintiff to remain disrobed, she was in full view of other persons, including several male employees of the Wayne County Sheriff's Department, a male janitor, as well as during interviews and tours of the jail . . . that despite repeated requests to jail personnel for clothing . . . and requests that Plaintiff be shielded from the view of others, the Defendants deliberately ignored such requests and behaved with conscious indifference and malice.

(Respondent's Amended Complaint ¶ 8).

ally averred that Wayne County had violated her constitutional rights.[6]

The respondent's complaints never alleged a distinct theory of County liability involving deliberate indifference on explicit policy, custom, or failure to train grounds.

7. Respondent presented no evidence whatsoever at her 1981 trial that Wayne County either inadequately trained or failed to train its employees.

8. At trial, respondent testified in conformity with the allegations in her complaint. She testified, for example, that a male custodian came by her cell several times and stared at her. She also claimed that a tour group, including the jail psychologist, came by her cell and laughed. (By its verdict of no cause, the jury obviously rejected this claim against the jail psychologist.) (Pet. App. A-56).

9. The jail administrator, acting within the constraints of the court-ordered suicide prevention plan, testified that while separate facilities were available for potentially suicidal male inmates, suicidal women were housed in the women's fourth floor annex along with non-suicidal women inmates. A suicidal woman would occupy a "suicide-proofed" cell in compliance with the court order.

10. The jail administrator also testified that he delegated decisions about the conditions of a suicidal inmate's confinement to the jail psychologist and psy-

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[6] Respondent alleged that the jail psychiatrist, jail psychologist and Petitioner deprived her of the due process right to "life, liberty, privacy and her constitutional right to adequate medication while a prisoner," thereby subjecting her to cruel and unusual punishment. (Amended Complaint ¶ 16).

chiatrist. He stated he was reluctant to substitute his opinions for those with expertise.[7]

11. The jail administrator had no specific policy prohibiting the exposure of stripped inmates. However, it was the custom at the jail in 1976 for female employees to handle female inmates. Further, the jail administrator insisted that a jail matron announce the impending presence of a male and accompany him onto the floor. The shift supervisor corroborated this testimony.[8] Finally, while student tours were allowed, a policy prohibited tour groups from walking by cells where unclothed females were housed.[9]

12. At the close of proofs, the trial judge directed a verdict for Wayne County, but permitted the 42 U.S.C. § 1983 claims against the jail psychologist and psychiatrist to be considered by the jury. The jury returned no cause for action verdicts in favor of the jail psychologist and psychiatrist.

13. On appeal, the Michigan Court of Appeals affirmed the directed verdict for petitioner, noting the court-ordered suicide prevention plan. (Pet. App. at A-56). The questions presented by the respondent in the Michigan Courts did not raise either a deliberate indifference/failure to train theory of liability. The Michigan Supreme Court initially granted leave to appeal, and later vacated its grant of leave to appeal. On rehearing of the order

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[7] *Youngberg* v. *Romeo*, 457 U.S. 307 (1982) (due process requires that the state provide involuntarily-committed mental patients with services sufficient to guarantee reasonable safety to themselves and others).

[8] She stated that practice and custom at the jail did not permit male deputies to be present when clothing was removed from a female inmate.

[9] There was no record of a tour during the days when respondent was incarcerated at the Wayne County Jail.

vacating its grant of leave to appeal, the Court first directed submission of briefs about the applicability of *City of Canton* v. *Harris*, 489 U.S. 378 (1989).

DISCUSSION

The Michigan Supreme Court remanded this case on a 42 U.S.C. § 1983 theory first presented 13 years after respondent's arrest and detention. The Michigan Supreme Court ruled, after *Canton* was decided, that respondent Rushing had been *unnecessarily* exposed in her semi-naked state to males. The Court suggested that a jury could properly find that Wayne County had been deliberately indifferent to the respondent's constitutional rights against being viewed by males because it had failed to train its employees. It found a federally-protected privacy right based on a selective and under-inclusive survey of cases, not one presenting the unique circumstances of a truly suicidal pretrial detainee whose clothing was removed pursuant to a court-ordered suicide prevention plan.[10]

The Michigan Supreme Court's misreading of *Canton* wrongly allows the *de facto* imposition of respondeat superior liability, contrary to *Monell* v. *New York City Department of Social Services*, 436 U.S. 658 (1978). The Michigan Supreme Court deviated from the culpability standards of *Canton* which require proof of two elements:

> 1.) inadequacy of training relative to the specific tasks the employee must perform;
>
> 2.) a deficiency in training closely related to the ultimate injury.

109 S. Ct. at 1205-1206.

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[10] Cf. *Fisher* v. *Washington Metro Area Transit Authority*, 690 F.2d 1133 (4th Cir. 1982) (feigned suicide attempt).

In this instance, the Michigan Supreme Court's failure to train analysis is badly flawed. Respondent's general allegation that she was detained in a semi-nude state and unnecessarily observed by others states no constitutional violation since a court order required respondent to be stripped to prevent jail suicides.

Apart from this general allegation, respondent principally argues that a male custodian stared at her several times, and that a group of male visitors passed by her cell and laughed. No training program could cure such wrongs. Municipalities would not regularly offer training classes on privacy rights of stripped inmates to maintenance-level employees. Nor would tour groups visiting a custodial institution ever receive the sort of training which the opinion suggests. Thus, no causal connection exists between the alleged training deficiency and the wrongs of which respondent complained. Additionally, policy then in force generally required female guards on the female ward.

Moreover, the privacy right of a suicidal pretrial detainee against being viewed in a semi-naked state, the predicate for the Michigan Supreme Court's remand, was not clearly established in 1976, nor at any time since. Generally, as long as jail officials have no intent to punish, a pretrial detainee retains those privacy rights not inconsistent with legitimate security needs of the institution. *Bell* v. *Wolfish*, 441 U.S. 520 (1979). The prevention of suicide is a legitimate security need of the institution. As such, a suicidal pretrial detainee's right not to be viewed in a semi-naked state by members of the opposite sex is properly subordinated to the state's paramount interest in protecting her life and the institution's security. Where a legitimate professional judgment as to the conditions of confinement has been made, as one plainly was here,

the due process clause is simply not offended. *Youngberg* v. *Romeo*, 457 U.S. 307 (1982).

ABSENCE OF POLICYMAKING DISCRETION

The touchstone of municipal liability pursuant to 42 U.S.C. § 1983 (1976) is the execution of official policy which causes a deprivation of rights secured by the Constitution. *Monell*, 436 U.S. at 694. The full contours of municipal liability under 42 U.S.C. § 1983 have yet to be developed. This case poses issues still unsettled in § 1983 jurisprudence after *City of Canton* v. *Harris*, 489 U.S. 378 (1989), *City of St. Louis* v. *Praprotnik*, 485 U.S. 121 (1988), and *Jett* v. *Dallas Independent School District*, __ U.S. __, 109 S. Ct. 2702 (1989).

In *Monell*, this Court held that municipal liability arises under 42 U.S.C. § 1983 only when "a governmental policy or custom" itself inflicts a constitutional injury. 436 U.S. at 694. Further, respondeat superior was held to be an inappropriate theory of municipal liability under § 1983. 436 U.S. at 691.

In *Canton*, the Court addressed the issue of municipal liability under § 1983 for failure to train its employees. Building on *Monell*, *Canton* held that municipal liability will attach only where "a municipality's failure to train its employees in a relevant respect evidences a *deliberate indifference* to the rights of inhabitants. Such failure may then constitute a policy or custom that is actionable under § 1983." 109 S. Ct. at 1205 (emphasis added). The *Canton* Court further admonished that:

> Only where a failure to train reflects a "deliberate" or "conscious" choice by a municipality — a "policy" as defined by our prior cases — can a city be liable for such a failure under § 1983.

109 S. Ct. at 1205.

Canton did not consider whether, under *Praprotnik*, a municipality can be held liable for a policy of deliberate indifference when the policymaker has little discretion and the parameters of the constitutional right at issue are ill-defined.

In *Praprotnik*, a plurality of this Court concluded that the decisions of a municipal officer constitute a policy attributable to a municipality, exposing it to liability under § 1983, only when the municipal official makes "final policy" pronouncements. *Praprotnik*, 108 S. Ct. at 919, 926, *quoting Pembaur* v. *City of Cincinnati*, 475 U.S. 469 (1986). Specifically, the Court opined that:

> *When an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departure from them, are the act of the municipality.*

108 S. Ct. at 926.

The need to harmonize *Praprotnik* and *Canton* is apparent in this case. The decision here rested entirely on the Michigan Supreme Court's construction of federal law, a construction clearly at odds with this Court's holdings. The Michigan Supreme Court held:

> [W]ith respect to the failure of jail policymakers to adequately train jail personnel, the jury could have found not only that policymakers failed to instruct employees in the constitutional limitations on the stripping and exposure of inmates, but also to formulate any policy in this regard.

436 Mich. at 262.

But the Michigan Supreme Court did not explain the scope of policymaking authority, since County officials

were bound to obey, and had no discretion to deviate from, the court-ordered suicide prevention plan. (Pet. App. A-116). As Petitioner notes, the Michigan Court of Appeals found these orders so explicit that little discretion was left to the Sheriff or jail administrator, quoting *Layton* v. *Quinn*, 120 Mich. App. 708, 328 N.W. 2d 95 (1982), *judgment vacated*, 422 Mich. 899 (1985). (Pet. at p 3). Thus, under *Praprotnik*, as the jail administrator was constrained under policies not of his own making, the court-ordered suicide prevention plan constituted the policy of petitioner Wayne County. Therefore, under the *Canton* standard of deliberate indifference, the jail administrator could not have made a deliberate or conscious choice to violate petitioner's constitutional rights, and liability should not attach.

Certainly, this Court in formulating the standards of municipal liability under § 1983 did not intend to impose liability for policies outside municipal control, and expose municipalities to liability for failure to train under those same external policies.

ABSENCE OF NOTICE – OF A CLEARLY ESTABLISHED RIGHT

A municipality's failure to train its employees must amount to a *conscious* choice to ignore the constitutional rights of citizens. *Canton*, 109 S. Ct. at 1205. A standard of deliberate indifference should rest on a finding that the municipality was *on notice* of constitutional injuries. 109 S. Ct. at 1205, n. 10. This view comports with Justice O'Connor's concurrence in *Canton:*

> Without some form of notice to the city, and the opportunity to conform to constitutional dictates . . . the failure to train theory of liability could completely engulf *Monell.*

109 S. Ct. at 1208. Recognizing the fundamental importance of notice of constitutional injuries, various circuits have explicitly or implicitly required notice prior to imposing liability on municipalities. *Kerr* v. *City of West Palm Beach*, 875 F.2d 1546 (11th Cir. 1989); *Merrit* v. *County of Los Angeles*, 875 F.2d 765 (9th Cir. 1989); *Bordanaro* v. *McCloud*, 871 F.2d 1151 (1st Cir. 1989), *cert. denied*, __ U.S. __, 110 S. Ct. 75 (1989).

Fair notice to a municipality of constitutional injuries requires a "pattern" of such violations, so that a municipality can be said to have a policy or custom to ignore violations of those rights. *Canton*, 109 S. Ct. at 1209-1210. *See also: City of Oklahoma City* v. *Tuttle*, 471 U.S. 808 (1985) (proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*).

Second, notice of ongoing constitutional violations also requires that the constitutional right at issue be sufficiently defined so that a municipality can implement policies to prevent its violation. Without such definition, municipalities are without "clear constitutional guideposts" and the potential for liability becomes unlimited. *Canton*, 109 S. Ct. at 1209. *Danese* v. *Asman*, 875 F.2d 1239, 1245 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1473 (1990) also recognized that:

> If the officers were not subject to a clearly established Constitutional duty, their supervisors cannot be liable for not training them to meet such duty.

Lack of notice in both forms exists in this case. Respondent never alleged or established a pattern of constitutional violations in the instant case. She did not demonstrate that other suicidal detainees were subjected to observation by members of the opposite

sex. Further, the contours of the right respondent alleges was violated has never been defined in this Court. Indeed, the courts are divided as to the existence of and nature of such a right.

ILL-DEFINED CONSTITUTIONAL RIGHTS AND ILL-DEFINED TRAINING RESPONSIBILITIES

If Wayne County had, in 1976, held a training class on the "constitutional limits of stripping and exposing suicidal inmates," as the Michigan Supreme Court suggested, what might the students have learned? First, this Court has never explicitly recognized such a right. Second, no cases in 1976 had considered this problem!

The legal landscape of federal circuits and state courts considering the question since 1976 have presented a host of divergent views. The Michigan Supreme Court found a constitutionally-protected privacy right against viewing by opposite-sex guards, without carefully considering a broad range of post-1976 case law balancing the Title VII rights of prison employees against the retained privacy rights of pretrial detainees/prison inmates.

The theory that respondent was *unnecessarily* exposed to the view of members of the opposite sex lacks constitutional validity. How much observation of a potentially suicidal inmate is too much observation? In *Colburn* v. *Upper Darby Township*, 838 F.2d 663 (3rd Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989), the Third Circuit found Upper Darby Township jailers could be held responsible under 42 U.S.C. § 1983 for failing to adequately monitor individuals who were suicide-prone. Applying *Colburn*, no amount of observation of a suicidal inmate can constitute a § 1983 violation. What the Michigan Supreme Court ignored is the state's duty to care for those confined to its custody, which requires

monitoring of those prone to suicide. *Partridge* v. *Two Unknown Police Officers*, 691 F.2d 1188-1189 (5th Cir. 1986). See also: *DeBow* v. *City of East St. Louis*, 510 N.E. 2d 895 (Ill. App. 1987), *app. denied*, 116 Ill. 2d 552, 515 N.E. 2d 105 (1987); *Danese* v. *Asman*, 875 F.2d 1239 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1473 (1990).

Following *Bell* v. *Wolfish*, 441 U.S. 520 (1979), the Sixth Circuit set out the proper analytic framework for suicidal pretrial detainees. In *Roberts* v. *City of Troy*, 773 F.2d 720 (6th Cir. 1985), the court recognized that pretrial detainees retain privacy rights not inconsisternt with the legitimate security needs of the institution, as long as there is no intent to punish. The Court also transposed *Bell* v. *Wolfish* failures to train in suicide prevention, and ruled that a failure to provide better suicide prevention training and employ better-trained employees did *not* constitute a constitutional violation:

> If a failure to act is reasonably related to a legitimate governmental objective, the failure to act cannot have the purpose of punishment unless the failure to act was deliberate. *Bell* v. *Wolfish* requires an intent to punish. Absent intent to punish, the police chief's failure to provide better suicide prevention training and to learn about and implement a new regulation and the City of Troy's failure to employ better trained jailers do not amount to constitutional violations because the failures arose from the allocation of resources, time, personnel, and money, which constitutes a legitimate governmental purpose.

773 F.2d at 725. See also, *Danese* v. *Asman*, 875 F.2d at 1245 (suicide training not required); *Beddingfield* v. *City of Pulaski*, 861 F.2d 968 (6th Cir. 1988) (standard of

proof is that a city *deliberately* sets out to train police officers inadequately in suicide prevention.)

TITLE VII RIGHTS OF JAIL/PRISON EMPLOYEES

The question of underlying privacy rights of a suicidal pretrial detainee is further clouded by the clash between privacy rights and Title VII rights of jail/prison employees.

In a significant Eastern District of Michigan court order, Judge (now Chief Judge) Julian Cook held that the Title VII rights of female correctional officers in the Michigan Department of Corrections required the assignment of females to formerly-male positions in the state penal system. He rejected the argument that same-sex guards were mandated to protect the privacy of inmates. He flatly stated: "Inmates do not possess any protected right under the Constitution against being viewed while naked by correctional officers of the opposite sex." *Griffin* v. *Michigan Department of Corrections*, 654 F. Supp. 690, 703 (E.D. Mich. 1982). The district court hence rejected any such constitutionally-rooted privacy right; see analysis at 654 F. Supp. 701-703, and cases cited therein, especially *In Re Montgomery*, 9-18-78, California Superior Court: "once such a viewing is justified by the prison's need for security, the viewing is not demonstrably more significant whether by male or female."

In *Torres* v. *Wisconsin Department of Health and Social Services*, 838 F.2d 944 (7th Cir. 1988), *cert. denied*, 489 U.S. 1017 (1989), 489 U.S. 1082 (1989), the Seventh Circuit also held that a policy designating female-only prison guards was a continuing violation of Title VII. The court there declined to find that the inmates' privacy rights dictated a same-sex guard. The court surveyed the state of law on inmate privacy

versus full employment rights of guards, 838 F.2d at 952-953. See also, *Hardin* v. *Stynchcomb*, 691 F.2d 1364 (11th Cir. 1982).

In summary, not only were respondent's privacy rights limited by her pretrial detention, they were further severely limited by her suicidal condition under the terms of the court order governing suicide-prone detainees. As this Court recognized in *Praprotnik*, 108 U.S. at 922, the legal landscape was rife with "evolving definitions." In its holding, the Michigan Supreme Court inadequately analyzed the state of authority before reaching the facile conclusion that training of jail employees would have averted a constitutional harm which it too readily found existed on these unusual facts.

The proper disposition of this case is that proposed by the dissenting justices below. At worst, the proofs below show that a sound program was negligently administered. They do not show any deliberate municipal policy choice among competing alternatives which inflicted a constitutional harm. The proofs here were not sufficient to permit a jury to infer from a single incident that Wayne County had or has a policy of inadequate training and to sanction the inference that the policy caused a wrong.

CONCLUSION

The Court should grant the Petition for Writ of Certiorari, vacate the judgment below, and reinstate the order of the Wayne County Circuit Court directing the verdict in favor of petitioner Wayne County.

Respectfully submitted,

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